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No.

In The Supreme Court Of The United States

OCTOBER TERM 1958

MIDWESTERN INSTRUMENTS, INC.,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Petitioner, Midwestern Instruments, Inc.

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In The Supreme Court Of The United States

OCTOBER TERM, 1958

No._____

MIDWESTERN INSTRUMENTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Petitioner, Midwestern Instruments, Inc.

To the Honorable, the Chief Justice of the United States and Associate Justices of the United States Supreme Court:

Petitioner prays that a writ of certiorari issue to review a decree of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on April 22, 1959, ordering enforcement of a decision and order of the National Labor Relations Board.

CITATION TO OPINION BELOW

The National Labor Relations Board entered its decision and order at Washington, D.C., February 25, 1958, printed as Appendix A hereto, *infra*, page 1a, 119 N.L.R.B. No. 224. The opinion of the Court of Appeals, officially re-

ported at 264 F. 2d 829, printed as Appendix B hereto, *infra*, page 21a, was filed on March 6, 1959.

JURISDICTION

Petition for rehearing was denied on April 9, 1959 (Tr. 10). The decree of the Court of Appeals, printed as Appendix C hereto, *infra*, page 26a, was entered on April 22, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1) providing for review of cases in the Courts of Appeals by writ of certiorari.

QUESTIONS PRESENTED

1. Did the Circuit Court depart from the accepted and usual course of judicial review, in a way probably in conflict with *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, by decreeing enforcement of a decision and order of the National Labor Relations Board for reinstatement of a discharged employee, whose admitted derelictions for which he was discharged and refused reinstatement had caused him to be reprimanded and threatened with discharge long before he became active in the union, and long before there was any organizational activity in the plant; and, the record further showing that he was dissatisfied with his job, was seeking other employment and, by his own admissions, was engaging in non-protected union activity, at the time, by soliciting union memberships during hours of work?

2. Is an employer to be held accountable before the courts for casual and perfunctory inquiry among employees in the plant about union activity while an organizational drive is under way?

STATUTE INVOLVED

The statute involved is the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. § 151, et seq., the pertinent portions of which are set forth in Appendix D to this petition, *infra*, page 28a.

STATEMENT OF THE CASE

On March 21, 1957, Petitioner, hereinafter called the Company, discharged one B. C. Neuman who had been hired into the plant about December 15, 1955 (R. 43).[1]

The Company's management thought it had the right to discharge an unsatisfactory employee and to refuse him reinstatement if the management had cause to be dissatisfied with his work (R. 18), and if that employee, in turn, had shown himself to be dissatisfied with his job (R. 58, 60, 61, 96).

Sometime prior to his discharge Neuman had been criticized and reprimanded by responsible supervision for too much talking and loafing (R. 50, 51, 62, 63, 88, 101).

He was known as a chronic loafer (R. 73, 74, 109). He had gained that reputation by reason of being frequently away from his work station, wandering about the plant, engaging others in conversation, all in contravention of plant rules (R. 38, 71, 72, 73, 77, 93, 95, 98, 101).

He has been guilty of incivilities involving defamation of the Bible and disparaging remarks about a fellow employee's religious beliefs (R. 62); cursing his supervisor (R. 48); false testimony in which he first denied, but later admitted that he had been soliciting Union memberships

[1] Record references are to the printed record.

on Company time (R. 60). His testimony that he was engaged in assisting with the testing of his work, as a part of his assigned duties, when fired (R. 46, 47) is impeached on the record (R. 14, 81).

The moving cause for his discharge is the undisputed fact of record, and as the Trial Examiner infers (R. 18), that he was loafing (R. 73, 88, 89, 103, 108, 109, 112).

The other part of the charge and complaint that was upheld and sustained against the Company by the decision and order of the National Labor Relations Board, hereinafter referred to for convenience as the Board, involves two conversations between different supervisors and their employees prior to the discharge.

Petra Navarro, whom the Trial Examiner held to be reliable, after she had manifested a very partisan attitude, because much the same could be said for a Company witness (R. 16, 17), says that Neuman came to her workstation the day before she was fired and asked her what she thought about the Union. She told him that it was up to each individual; she was a Union member and the Company knew it when she was hired. Immediately after her conversation with Neuman, Irvine E. Lowe, her supervisor, came to her and asked what Neuman said to her, and she told him the same thing she told Neuman. After persistent questioning by counsel, the witness was caused to say that Lowe asked her if she belonged to the Union; if Neuman tried to get her into the Union. Nothing else was said; Lowe walked off (R. 33, 34).

The other conversation was between Charles L. Cart, a leadman, and D. B. Piester, the Company's Production Superintendent. Cart approached Piester and asked whether, in view of a pending reduction in force, the Company could

get rid of the Union leaders, in connection with the lay-off, if they were known. Piester replied that he definitely would not follow such a suggestion because it would put the Company in a bad position. He did not say in what way the Company would be prejudiced. Piester asked Cart why Cart came to him with any such suggestion, and why did he want to know the Company's position in the regard mentioned. Cart said he was just curious. Piester was then caused to observe that it sounded like Cart knew who the leaders were and wanted to know if he did and Cart told him no. Cart asked Piester if Piester knew the identity of the Union leaders. Piester said no, but if he did the Company would not be a party to Cart's plan.

Piester further told Cart he had heard on the outside of the plant, from a neighbor, the description of a large fellow who could be a leader of the Union, not a close description, but it fitted Bud Neuman (R. 70).

Although his testimony does not relate to any charge that had been laid in the complaint (R. 5-8), the Examiner, on the hearing, and at the close of the Company's case, permitted Government counsel, over the objections of opposing counsel (R. 117, 118), to use George R. Shaull, the Union's Business Agent, as a rebuttal witness. He related a conversation on March 19, with M. E. Morrow, Chairman of the Board for Midwestern Instruments, Inc., in which he told Morrow the Union was organizing the plant, and Morrow said it wouldn't do any good to organize. They would never get a union in that plant (R. 116). In a second conversation between the witness and Morrow after Neuman was fired, Morrow said, in the course of a heated exchange between them, that he, Morrow, would fire any ..... that he wanted to (R. 117).

On the other hand, the record shows that immediately following the first conversation between Shaull and Morrow, Morrow called his supervisors and other key personnel together to advise them that he had learned of an attempt being made to organize the plant and had called the meeting to enlighten those present of the organizational activity and to instruct them that they were not to do anything except discourage any loafing or talking on the job (R. 69).

After the hearing and within due course the Honorable Trial Examiner filed his Intermediate Report in which he concluded that Neuman was terminated, not for his loafing, but for his Union activities, and although the Company may have had some cause for dissatisfaction with Neuman's work, such dissatisfaction apparently became intolerable only after he had joined the Union. Based thereon the Examiner recommended and the Board ordered Neuman be reinstated. Because of Piester's conversation with Cart and Lowe's conversation with Miss Navarro, the Honorable Trial Examiner concluded that there had been unlawful interference, restraint and coercion of the Company's employees in the exercise of rights guaranteed them under the Act (R. 18). The Board, by a *pro forma* decision and order, adopted the Honorable Trial Examiner's recommendations (R. 27).

The Court of Appeals for the Tenth Circuit upon petition for enforcement, after answer by the Company, took the view that the Court had before it only a conventional enforcement proceedings and, in an opinion by the Honorable Justice Huxman, upheld enforcement of the Board's decision and order: Appendix B, *infra*, page 21a. In its opinion the Court did not undertake to distinguish the authorities relied upon and the points raised and argued in the Company's brief but concerned itself with the one

proposition of whether or not there was substantial evidence of a violation of the National Labor Relations Act, without regard to a fair estimate of the worth of testimony of witnesses in keeping with the Court's informed judgment or without regard to the Court's responsibility for seeing to it that the Board keeps within reasonable bounds.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THE CIRCUIT COURT MISTAKES ITS POWERS OF REVIEW.

The Court below, in its opinion, treats of the subject matter as a *conventional* enforcement proceeding. The proceeding is *legal* and *judicial*, not *conventional*.

The view adopted by the Circuit Court gives to the Trial Examiner's Intermediate Report and the Board's Decision and Order the prestige duly accorded trials and decrees in accordance with the judicial process that should be vested only in Courts of record. The hearing before the Trial Examiner is not a legal proceeding in any case of the word and the Board's Decision and Order is not a judicial review.

As said by this Court in *Universal Camera Corporation* v. *N. L. R. B., supra*, it remains for Courts with the prestige of the Court of Appeals to determine what is a fair estimate of the worth of testimony of witnesses "in keeping with the Courts' informed judgment on matters within their special competence or both for purposes of seeing to it that the Board keeps within reasonable bounds."

The Court below holds to the view that its review is limited to an inquiry whether an examination of the en-

tire record supports the conclusion that the Board's findings are supported by substantial evidence, but it fails to remember that the responsibility for seeing to it that the Board keeps within reasonable bounds "is not less real because it is limited to enforcing the requirement that evidence appear substantial, when viewed on the record as a whole, by courts vested with the authority and enjoying the prestige of the Court of Appeals." *Universal Camera Corporation, supra.*

Accordingly, it naturally follows that something more than the "judicial echo" of what the Examiner and the Board have found to be in violation of the Act, is to be expected of the Circuit Courts in connection with their powers of review.

II. DEPARTURE BY THE CIRCUIT COURT FROM THE ACCEPTED AND USUAL COURT OF JUDICIAL PROCEEDINGS CALLS FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

A careful review of cases decided and reported in the Tenth Circuit, before and after amendments to the Act, discloses that the Court below in only three cases[2] has refused to enforce a Board order in a discharge case. In twelve cases[3] the Board's order for reinstatement of a discharged employee has been enforced.

Aside from the weight of impressive numbers, the disturbing thing is that the Circuit Court seemingly remains unimpressed by amendments enacted by Congress for correction of abuses in connection with the Board's former enforcement powers.

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[2] 114 F. 2d 513, 140 F. 2d 423, 198 F. 2d 313.

[3] 126 F. 2d 414, 131 F. 2d 665, 138 F. 2d 410, 138 F. 2d 546, 148 F. 2d 168, 154 F. 2d 570, 154 F. 2d 719, 149 F. 2d 169, 188 F. 2d 50, 192 F. 2d 236, 204 F. 2d 579, 215 F. 2d 49.

To enforce the Board's Decision and Order in the instant case will be to ignore the clear aims and purposes of Section 10(c) of the Act, as amended, 29 U. S. C. 160(c), and to restrain the Company in the exercise of the free speech guaranteed by Section 8(c) of the Act, as amended, 29 U. S. C. 158(c). See Appendix D, *infra*, page 28a. Neuman's discharge and the Company's refusal to reinstate him were for cause. The Board's Decision and Order is not based on "the preponderance of the testimony." All views, by whomsoever expressed, amounted to protected activity.

Also, the provision made in Section 10(c), as amended, according to the majority report of the House Labor Committee, "is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." The Board would be forbidden, the House Report adds, from "inferring" an improper motive when the evidence showed cause for discipline or discharge.

There is no acceptable substantial evidence on the whole record for enforcing the Board's Order. But the reviewing court refused to weigh the conflict there is in the evidence by reason of the unreliable testimony that was given by the witness, Miss Navarro, and the discharged employee, Neuman. It would have been more in order and in keeping with the direction of the Court in the *Universal Camera Corporation* case, for the Circuit Court to have determined "what is a fair estimate of the worth of testimony of witnesses." To say, as the Court does in the opinion, that "there is evidence from which the Examiner and the Board could have found that Neuman was discharged for valid reasons and not in violation of

the Act, rather than as found by the Board that he was discharged in violation of the Act," is to deny the Company the advantage of a decision "in keeping with the Courts' informed judgment on matters within their special competence or both for purposes of seeing to it that the Board keeps within reasonable bounds."

Additionally, it is not enough that there is some evidence upon which to base a finding that the Act was violated, else Congress did a futile thing by making changes in the Act which now require the Board's findings, that an unfair labor practice has been committed, are to be based on "the preponderance of the testimony" rather than all "the testimony."

III. THE CIRCUIT COURT'S DECISION IS IN CONFLICT WITH DECISIONS OF THE COURTS OF OTHER CIRCUITS INVOLVING BOARD REVIEW.

Petitioner refused to voluntarily comply with the Board's Decision and order upon advice of counsel who saw in the Intermediate Report the same "shocking injustices," "asinine reasoning," and "findings that strain the credulity," condemned in *Wilson & Company* v. *N. L. R. B.*, 126 F. 2d 114, 117 (C.A. 7); *Wyman-Gordon Company* v *N. L. R. B.*, 153 F. 2d 480, 483, *et seq* (C.A. 7); *N. L. R. B. v. Columbia Products Corporation*, 141 F. 2d 687, 688 (C.A. 2); *N. L. R. B.* v. *Union Pacific Stages, Inc.*, 99 F. 2d 153 (C.A. 9).

It was further argued to the Court below that substantial evidence is something more than a modicum or a scintilla of evidence and an order of the Board that is rooted in imponderables, surmise, guess, speculation or suspicion of ulterior motives does not meet the test of

substantial evidence. *N. L. R. B.* v. *Shen-Valley Meat Packers*, 211 F. 2d 289 (C.A. 4); *N. L. R. B.* v. *Union Pacific Stages, Inc.*, *supra*.

The opinion below, grounded on an Examiner's Report, Appendix A, *infra*, page 1a, which turns, in part, on the proposition that the unconvincing reasons advanced to explain Neuman's discharge (R. 18) warranted his reinstatement, is not in keeping with what was said by the Court in *N. L. R. B.* v. *T. A. McGahey, et al*, 233 F. 2d 406 (C.A. 5), in which the Court held:

> "In proceeding under the National Labor Relations Act, employer does not have duty of sustaining burden of giving sufficient explanation for discharge of a particular employee, but rather general counsel has duty to establish by acceptable substantial evidence on the whole record, that the discharge came from the forbidden motives of interference in employee statutory rights, National Labor Relations Act, 10(c) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. 160(c)."

Also, the opinion by the Circuit Court holds that although the evidence with respect to the violation of Section 8(a)(1) of the Act is rather meager (not substantial), the conduct of Piester and Lowe could well intend to influence the employees and interfere with the free exercise of their organizational rights under the Act. This part of the opinion clearly is in conflict with decisions by other Courts of Appeal. See *N. L. R. B.* v. *England Bros. Ins.*, 201 F. 2d 395 (C.A. 1); *Sax* v. *N. L. R. B.*, 171 F. 2d 769 (C.A. 7); *N. L. R. B.* v. *Mississippi Products, Inc.*, 213 F. 2d 670 (C.A. 5); *N. L. R. B.* v. *J. E. McCatron, et al*, 216 F. 2d 212 (C.A. 9); *N. L. R. B.* v. *Associated Dry Goods Corp.*, 209 F. 2d 593 (C.A. 2); *N. L. R. B.* v. *W. T. Grant Company*, 208 F. 2d 710 (C.A. 4).

The Court below, with what appears to be studied indifference and a disposition to ignore the authorities cited and relied upon by the Company in its brief, does not undertake to discuss, much less distinguish, those cases herein cited. The result will be uneven justice if employers in this jurisdiction are treated differently by the Court upon which they are compelled to rely to keep the Board within reasonable bounds, and employers in other jurisdictions are held to a different course of conduct by reason of a difference of opinion between Circuit Courts in connection with their powers of review.

Because the decision below has created important and unwarranted exceptions to the basic principles embodied in the Act and in this Court's opinion, and is in direct conflict with decisions of other Courts of Appeal, review by this Court is essential.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

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October, 1958

APPENDIX A

DECISION AND ORDER

On August 16, 1957, Trial Examiner Robert E. Mullin issued his Intermediate Report in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed insofar as it alleges certain violations of Section 8(a)(1) of the Act. Thereafter, Respondent filed exceptions to the Intermediate Report and a supporting brief. The General Counsel filed no exceptions.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner.[1]

ORDER

Upon the entire record in the case and pursuant to

[1] Respondent argues that the Trial Examiner should not have credited the testimony of Petra Navarro in view of his findings that at times she "manifested a very partisan attitude," and that certain of her testimony was inconsistent with the testimony of Neuman, the dischargee. We disagree. In our view, the testimony of Navarro was worthy of belief.

Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Midwestern Instruments, Inc., Tulsa, Oklahoma, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

"(a) Discouraging membership in International Brotherhood of Electrical Workers, Local Union No. 584, AFL-CIO, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or by discriminating in any other manner in regard to their employment;

"(b) Interrogating any employees, in a manner constituting interference, restraint, or coercion or violation of Section 8(a)(1) of the Act, as to their attendance at union meetings or as to whether they have been solicited to join a union;

"(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the International Brotherhood of Electrical Workers, Local Union No. 584, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act."

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Offer B. C. Neuman immediate and full reinstatement to his former or substantially equivalent

position without prejudice to his seniority or other rights and privileges and make him whole, in the manner set forth in the section of the Intermediate Report entitled 'The remedy' for any loss of pay he may have suffered by reason of the Respondent's discrimination;

"(b) Preserve and make available to the Board, or its agents upon request for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due;

"(c) Post at its plant in Tulsa, Oklahoma, copies of the notice attached to the Intermediate Report and marked Appendix.[2] Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

"(d) Notify the Regional Director for the Sixteenth Region in writing, within 10 days of the day of this Order what steps the Respondent has taken to comply herewith."

It is further ordered that subsection (b) of paragraph 8 of the complaint be dismissed.

[2] This notice is amended by substituting for the words, "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a decree of the United States Court of Appeals, enforcing an Order." This notice is further amended by inserting the words "in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act" after the words "We will not interrogate our employees."

Dated at Washington, D.C., February 25, 1958.

BOYD LEEDOM, Chairman
PHILIP RAY RODGERS, Member
STEPHEN S. BEAN, Member
(Seal) *National Labor Relations Board.*

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding, brought under Section 10(b) of the Labor Management Relations Act, 1947, 61 Stat. 136 (herein called the Act), was heard in Tulsa, Oklahoma, on June 5 and 6, 1957, pursuant to due notice to all parties. The Complaint, issued on May 16, 1957, by the General Counsel of the National Labor Relations Board, and based on charges duly filed and served, alleged that the Respondent had engaged in unfair labor practices, prescribed by Section 8(a)(1) and (3) of the Act. In its answer, duly filed, the Respondent conceded certain facts with respect to its business operations, but denied the commission of the alleged unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard, to examine and cross examine witnesses, to introduce relevant evidence, to argue orally and to file briefs. At the conclusion of the hearing a motion by the Respondent to dismiss the complaint was taken under advisement. It is disposed of as appears hereinafter in this Report. On July 9, an able brief was received from the General Counsel and on July 10, an unusually thorough and comprehensive brief was submitted by counsel for the Respondent.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT.

The Respondent, a Delaware corporation, with its principal offices and plant in Tulsa, Oklahoma, is engaged at that location in the manufacture, sale, and distribution of electronic and electro-mechanical instruments. In the course and conduct of its operations, it annually ships in interstate commerce more than $50,000 worth of its products to points outside the State of Oklahoma. In addition, during the 12-month period immediately preceding the hearing, the Respondent furnished to the United States Government, pursuant to various contracts, electronic and electro-mechanical instruments and parts and supplies valued in excess of $100,000, said products being directly related to the National Defense. The Respondent conceded that, for the purposes of this proceeding, it is engaged in commerce within the meaning of the Act. Upon the foregoing facts that is likewise my conclusion and I so find.

II. THE LABOR ORGANIZATION INVOLVED.

The International Brotherhood of Electrical Workers, Local Union No. 584, AFL-CIO, herein called the Union, is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES.

A. Sequence of events.

Early in March 1957, an attempt to organize the employees at the Respondent's plant was initiated. On about March 1, B. C. Neuman, an employee in the electrical assembly shop, contacted George R. Shaull, business manager

for the Union, and the latter arranged for an organizational meeting of the Respondent's employees at the union hall. This meeting, held on the evening of March 8, was attended by Neuman and seven of his co-workers, all of whom signed union authorization cards that night. The following day Neuman persuaded 16 other fellow employees to sign cards and in the week thereafter he also induced several other employees at the plant to do likewise.[1] On March 18, the Union held another meeting which approximately 32 employees attended.

On the following morning, Glee David, foreman of the electrical assembly shop and, as such, Neuman's immediate superior, initiated a conversation with Neuman during the course of which he told the employee that he had heard rumors of an attempt to organize a union and that he would suggest that before the employees considered anything like that it would be well for them to think of the liberal pay raises the Company had granted in the past. He added that at the moment the Company was not making any money and could not afford to give any further increases.[2] That same morning, while on a tour of the plant, Mr. D. B. Piester, production superintendent, entered the stockroom and engaged the two employees there in conversation. According to Richard R. Claver and James K. Nave, the two storeroom men on duty, Piester asked them if they had been to the union meeting the night before. When both answered in the affirmative Piester proceeded to discuss the subject of unions in general. In so doing he stated that he had once been a union member himself and that he felt that if a union organized the plant there were some privileges the employees might lose and others they might gain.

[1] At the hearing Neuman conceded that he obtained some of these signatures on Company time.

[2] The foregoing finding is based on Neuman's testimony which Mr. David did not deny while on the stand.

He suggested that the men think about the matter carefully and be sure they did the right thing. During the course of the discussion Nave declared to the superintendent, "You can't blame me for attending a union meeting." According to the employee, Piester then assured him with the remark, "No, that's a privilege that you have . . . I don't blame you at all. I just heard that you attended a union meeting."[3]

At about this same time Charles Cart, a leadman in the electrical assembly shop,[4] went to Piester to suggest that in the event of a layoff the Company could rid itself of the union adherents by the simple expedient of including the leaders in any reduction. Cart testified that the production superintendent immediately negatived this proposal on the ground that to follow it would involve the Company in serious difficulties. In their subsequent conversation, however, Piester asked if, in view of his suggestion, Cart knew who the union leaders were. The latter stated that he did not. Then, according to Cart, Piester related the description of an employee whom a neighbor had told him was the union leader. Cart testified that the description fitted Neuman. On March 19, Shaull telephoned Mr. M. E. Morrow, chairman of the board of directors for the Respondent, to tell him that the Union had begun an organizational campaign among his employees. According to Shaull, Mr. Morrow told him "it wouldn't do us no good to organize . . . we would never get a union in that plant."[5] Petra Navarro, an employee in the coil winding department, testified that just before her shift began work on March 20, Neuman came to her work place and engaged in a short conversation

[3] The foregoing findings are based on the credited testimony of Claver and Nave which was not contradicted or denied by Mr. Piester.

[4] The parties stipulated that Cart is not a supervisor within the meaning of the Act.

[5] Shaull's testimony as to this conversation was neither contradicted nor denied.

about the Union. According to Navarro, immediately after Neuman left, Irvin E. Lowe, her supervisor,[6] came to her position to ask whether Neuman had discussed the Union. Lowe denied that he ever had such a conversation with her. This conflict is resolved *infra*.

On the morning of March 21, Neuman was discharged. That afternoon Shaull telephoned M. E. Morrow to protest the dismissal. There followed a heated exchange between the two in which Shaull admittedly used profanity. It was undenied, however, that during the course of this conversation Mr. Morrow declared that he would "fire any..... .... he wanted to . . . that no ..... union was ever going to organize that plant . . . they had tried it before and didn't have any success" and that "he would come out and clean out the whole union . . ."[7]

B. NEUMAN'S DISCHARGE.

This employee was hired in December 1955, for work as a wireman in the electrical assembly shop, where he was engaged during most of his employment in making oscillograph harnesses.[8] He was terminated on the morning of March 21, 1957. G. R. Morrow, president of the Respondent and son of M. E. Morrow, testified that he ordered the discharge after he had observed Neuman for 15 minutes during which time the employee did nothing but loaf at the harness tester's bench. Neuman conceded that he had

[6] Although Lowe is referred to as a leadman in certain portions of the transcript, he himself testified that he was a "supervisor foreman." The Respondent conceded that he was a supervisor within the meaning of the Act.

[7] These quotations are from Shaull's uncontradicted testimony.

[8] These are electronic instruments used to record and log data in many different types of dynamic analysis. As a device for recording abnormal strains they are used in conjunction with gauges and other instruments which check on the performance of aircraft, jet engines and guided missiles.

spent about 10 minutes there, and upon learning that the harness was in working order, started back to his bench to begin another job. At that moment Foreman David accosted him to announce "you are slowing up production and that's a good enough reason to let you go."[9] Neuman asked if that meant he was being fired and the foreman answered in the affirmative. The employee then left the plant.

At the time it was shop practice for the wireman, upon completing an oscillograph harness, the assembly of which would require from 2 to 3 days, to bring it to an employee at a nearby bench who was designated as harness tester. The latter then performed certain tests on the instrument which disclosed whether it had been correctly assembled. Normally, the tester could determine within 5 to 10 minutes whether a harness was in working order. In the event he found defects the harness was returned for correction to the wireman who had assembled it. According to Neuman, it was part of his duties to assist the tester during the latter's examination of the completed harness. His testimony in this regard, however, was not convincing and it was not corroborated by any other witness. It was denied by Foreman David, who testified that a wireman had no such responsibility, and Walter L. Wood, the harness tester, who stated that it was not necessary that the wireman assist him in any way while he was checking a harness. On the other hand, Wood also testified that Neuman and the other wiremen frequently stayed at the testing bench while he examined their work, and that in so doing, they waited five and sometimes ten minutes during which they did nothing but watch and talk with him. He further testified that no supervisor had ever complained regarding this practice of the wiremen. He also stated that on the morning of March 21,

[9] The quotation is from Neuman's testimony. It was not contradicted nor denied by David.

Neuman was at his bench for 10 to 15 minutes, that during that time Mr. G. R. Morrow walked by and within 2 to 3 minutes thereafter Neuman returned to his own bench.

Mr. G. R. Morrow testified that on March 21, he returned to the plant after being absent for 2 weeks on a business trip and immediately set out on a routine tour of the departments to check on their operations. Upon entering the large room which housed the electrical assembly shop under Foreman David and the coil winding department under Foreman Irvin E. Lowe, he noticed an employee whom he did not know who was standing idly at the tester's bench. Upon inquiring of Lowe, the foreman identified the employee as Neuman, and described him as "one of the chronic loafers in the electric shop." According to Mr. Morrow, he remained with Lowe for a short while and then, after having observed Neuman do nothing for 15 minutes, he went directly to the office of Superintendent Piester where he ordered that Neuman be discharged immediately. Piester remarked that he had had trouble with Neuman before and then instructed David, who was present in the office, to notify Neuman of his dismissal. Mr. Morrow conceded that he did not ask Piester or anyone else to review Neuman's work record and stated that his decision was based solely on his own observation of Neuman that morning.

There was much testimony about Neuman's employment history with the Respondent. Superintendent Piester testified that on three different occasions during the preceding year he had directed that Neuman be reprimanded for talking on the job. Foreman David testified that in July or August, 1956, he told this employee to improve the quality of his work and quit talking. About 2 months later he reprimanded Neuman again for the same reason and told him that unless there was an improvement he would be terminated. He further testified that in December it had been

necessary to reprimand Neuman a third time. On cross-examination, however, David conceded that this last reprimand was directed not to Neuman alone but to the whole shop and that on that occasion he had had to admonish all of his employees as a group for their tardiness in reporting for work and in returning from rest periods. According to David, at this time, "most everybody was getting lax . . ." Mr. Piester and David conceded that they had never discussed any of Neuman's deficiencies with G. R. Morrow prior to his discharge.[10]

There is also some evidence that David was satisfied with Neuman's work record. In January, 1957, the employee was eligible for his annual vacation. However, he wanted to take it during the following summer. Since the Company rules provided that in the event of a layoff no vacation pay would be allowed, Neuman asked David if there was any reason why he could not take his vacation in July rather than during the winter. David told Neuman there was no reason to expect that he would be laid off and that, therefore, he could plan on taking his vacation in July.[11] Neuman conceded that on two occasions in 1956 David had reprimanded him for "talking and killing time."[12] He also testi-

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[10] One other witness for the Respondent should be mentioned. This was Berl R. Hall, foreman of the servo shop, who testified that he had seen Neuman in his department several times in February and March and that on each occasion Neuman was talking to Hall's employees during working hours. Hall indicated that he considered these visits unauthorized and a dereliction on Neuman's part. On the other hand, he conceded that he had never reprimanded Neuman on any of those occasions, nor had he ever reported the matter to Neuman's foreman, or to any of his superiors in management. In view of these concessions it is obvious that Mr. G. R. Morrow had no knowledge of any such incidents at the time he ordered Neuman's discharge.

[11] The foregoing finding is based on the mutually corroborative testimony of Neuman and David.

[12] The quotation is from Neuman's testimony.

fied, and in this respect his testimony was undenied, that in about December 1957, David had complimented him on his work and that in two other instances, once in January 1957, and on another occasion in February, Charles Cart, his leadman, told him that he was the "fastest and best man he had."[13]

The General Counsel relies on another incident to substantiate the allegation that Neuman was discriminatorily terminated. Petra Navarro testified that on the morning of March 21, Mr. G. R. Morrow and Foreman Lowe were standing within a short distance of her work bench and that she saw Lowe point across the room at Neuman and declare to the plant president "There is the boy that caused the whole deal." Both Morrow and Lowe denied that any such remark was uttered. They conceded that they had had a conversation at the time and place fixed by Navarro and that during the course of their discussion Lowe had, in fact, pointed at Neuman. According to the plant president and the foreman, however, their conversation was concerned solely with Neuman's loafing which Mr. Morrow had just noted. The Respondent vigorously attacks Navarro's credibility. It is true that some portions of her testimony were contradicted even by Neuman[14] and that at times while on the stand she manifested a very partisan attitude. However, much the same could be said for some of Lowe's testimony. It is the heavy responsibility of the Trial Examiner to resolve such conflicts in the record to the best of his ability. At times he must rely to some extent on his reaction to the manner in which the testimony was

[13] The quotation is from Neuman's testimony.

[14] For example, Navarro testified that after the conversation in question she saw somebody other than David come out on the work floor to summon Neuman into the foreman's office. Neuman, however, testified that it was David himself who came to his work bench and asked that he come into the shop office.

given and the comparative demeanor of the witnesses while on the stand. That is largely the situation here, and on that basis, as to this incident, it is my conclusion that Navarro's testimony is the more reliable and that Lowe did point out Neuman to the plant president with the remark that he was the one who "caused the whole deal." Moreover, because of this conclusion as to her credibility in this connection, I also find that, as Navarro also testified, on March 20 Lowe questioned her as to whether Neuman had sought to get her into the Union.

The summary punishment meted out to Neuman was admittedly unusual by all standards at the Respondent's plant. Piester testified that he could only recall two instances in which he had ordered a man terminated for loafing during the approximately 3 years that he had been superintendent. In both cases the employee had just been hired and was still on probation. David testified that he had never discharged anyone for loafing or talking too much and, furthermore, that he knew of no employee who had been dismissed for that reason. Mr. G. R. Morrow conceded that Neuman was the first employee whose discharge he had ever recommended for loafing. He likewise testified that "It has not been customary practice to fire people at Midwestern at all."

The Respondent was, indeed, free, as its Counsel argued at the hearing and in their brief, to fire Neuman for a good reason, a bad reason, or no reason, so long as the reason was not, in fact, the employee's union activities. At the same time it is also pertinent to recall a somewhat recent observation of the Court of Appeals for the Eighth Circuit that under the Act here involved "a justifiable ground for dismissal is no defense if it is a pretext and not the moving cause," *N. L. R. B.* v. *Solo Cup Company*, 237 F. 2d 521,

525 (C.A. 8). Mr. G. R. Morrow denied that he had any knowledge of Neuman's union activities. However, he admitted having heard, some two weeks earlier, that the Union was trying to organize the plant, and Lowe, who pointed out Neuman to him as the "cause of the whole deal," had interrogated Navarro about Neuman's union activities the day before. For this reason it is my conclusion, and I find, that Mr. Morrow did know about Neuman's interest in the union prior to ordering that the employee be discharged. Moreover, in view of this knowledge on Mr. Morrow's part, Neuman's prominence in the organizing campaign, the abruptness of his discharge, the unconvincing reasons advanced to explain it, and Mr. M. E. Morrow's comment subsequent to the dismissal that "no ..... union was ever going to organize that plant," it is my conclusion that Neuman was terminated, not for his loafing, but for his union activities. Although Neuman clearly had no more than an average employment record and the Respondent may have had some cause for dissatisfaction with his work, as the Court of Appeals for the Third Circuit observed in a similar case, "it apparently became intolerable only after he had joined the union." *N. L. R. B.* v. *Electric City Dyeing Co.*, 178 F. 2d 980, 983 (C.A. 3). For the reasons set out above, I find that by its discharge of Neuman the Respondent violated Section 8(a)(3) of the Act.

C. CONCLUSIONS AS TO THE ALLEGATIONS OF INTERFERENCE, RESTRAINT, AND COERCION.

I further find, on the foregoing facts, that the Respondent violated Section 8(a)(1) of the Act by the conduct (1) of Superintendent Piester in questioning Cart as to the identity of the union leader at the plant (*Atlas Boat Manufacturing Co., Inc.*, 116 NLRB 565, 572-573; *Hammond Brick Company*, 111 NLRB 6; *St. Louis Car Company*, 108 NLRB

1523; *Bowling Green Manufacturing Company*, 108 NLRB 1608), and (2) of Foreman Lowe in questioning Navarro as to whether Neuman had sought to persuade her to join the union (Idem). On the other hand, I do not find any coercive element in the testimony as to Piester's conversation with Nave and Claver. As the record reflects this discussion, although Piester asked them whether they had attended the union meeting the night before, and in his discussion of the relative merits of organization suggested that the employees might lose some benefits, he also conceded that the employees might gain other privileges. This type of speech is plainly protected by Section 8(c). Cf. *Lanthier Machine Works*, 116 NLRB 1029, 1037; *Nacona Boat Company*, 116 NLRB 1860, 1865-1866. So, too, was the conversation which David had with Neuman in which he suggested that the employee should carefully weigh the merits of a union and consider all that the Company had done for its employees. These last two incidents involving Piester and David were alleged by the General Counsel's complaint to have involved violations of Section 8(a)(1). I disagree and will recommend that Section 8(b) of the complaint, which contains this allegation, be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE.

The activities of the Respondent set forth in Section III above, occurring in connection with the operations of the Respondent described in Section 8, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY.

Having found that the Respondent has engaged, and

is engaging, in unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent discriminatorily discharged B. C. Neuman on March 21, 1957, I will recommend that the Respondent offer him immediate and full reinstatement without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings that he may have suffered by payment to him of a sum of money equal to that which he normally would have earned from the aforesaid date of his discharge to the date of the Respondent's offer of reinstatement, less net earnings during said period. The back pay provided for herein shall be computed in accordance with the formula stated in *F. W. Woolworth Company*, 90 NLRB 289.

I will also recommend that the Respondent, upon reasonable request, make available to the Board and its agents, all payroll and other records pertinent to an analysis of the amount due as back pay.

Since I have found that the Respondent, by various acts, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in the Act and particularly because the discriminatory discharge found herein goes "to the very heart of the Act" (*N.L.R.B.* v. *Entwistle Manufacturing Co.*, 120 F. 2d 532, 536 (C.A. 4), and indicates a purpose to defeat the self-organization of its employees, I am convinced that the unfair labor practices committed are related to other unfair labor practices proscribed and that the danger of their commission in the future is to be anticipated from Respondent's conduct in the past. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, I will recommend that the Respondent cease and de-

sist from in any manner infringing upon the right of employees guaranteed by the Act. *May Department Stores* v. *N. L. R. B.*, 326 U. S. 376, 386-392.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSION OF LAW

1. The Respondent is, and at all times relevant herein, was, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By discriminating in regard to the hire and tenure of employment of B. C. Neuman, thereby discouraging membership in the Union, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent had engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

6. The Respondent did not interfere, restrain or coerce its employees in the manner alleged in subsection (b) of paragraph 8 of the complaint.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record of the case, I recommend that the Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Electrical Workers, Local Union No. 584, AFL-CIO, or any other labor organization of its employees or by discriminating in any other manner in regard to their employment;

(b) Interrogating any employees as to their attendance at union meetings or as to whether they have been solicited to join a union;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the International Brotherhood of Electrical Workers, Local Union No. 584, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Offer B. C. Neuman immediate and full reinstate-

ment to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole, in the manner set forth in the section entitled "the remedy" for any loss of pay he may have suffered by reason of the Respondent's discrimination;

(b) Upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due;

(c) Post at its plant in Tulsa, Oklahoma, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Sixteenth Region, in writing, within 20 days from the receipt of this Intermediate Report, what steps the Respondent has taken to comply herewith.

I also recommend, for the reasons set forth earlier herein, that subsection (b) of paragraph 8 of the complaint be dismissed.

I further recommend that unless, on or before 20 days from the receipt of this Intermediate Report, the Respondent notifies said Regional Director in writing that it will comply

with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the aforesaid action.

Dated at Washington, D.C., this 16 day of August, 1957.

ROBERT E. MULLIN,
Trial Examiner.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

On Petition for Enforcement of an Order of the National Labor Relations Board

No. 5944

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

MIDWESTERN INSTRUMENTS, INC., Respondent.

(Filed in the United States Court of Appeals for the Tenth Circuit, March 6, 1959—Robert B. Cartwright, Clerk)

Frank Sperandeo (Jerome D. Fenton, Thomas J. McDermott, Marcel Mallett-Prevost, Fannie M. Boyls, Donal R. Klank were on the brief) for Petitioner.

R. J. Woolsey and A. Langley Coffey (Farmer, Woolsey, Flippo & Bailey; Coffey and Coffey, were on the brief) for Respondent.

Before HUXMAN, MURRAH and BREITENSTEIN, United States Circuit Judges.

HUXMAN, Circuit Judge.

This is a conventional enforcement proceeding by the National Labor Relations Board against respondent, Midwestern Instruments, Inc., pursuant to Section 10(a) of the National Labor Relations Act. The Board found that respondent violated Section 8(a)(1) and (3) of the Act by interrogating employees regarding their union leadership and activities of fellow members, and by discharging em-

ployee B. C. Neuman because of his union leadership. Based upon its findings, it issued a cease and desist order requiring respondent to cease and desist from its unlawful conduct, reinstate Neuman, make him financially whole, and post appropriate notices. It is this order which it asks us to enforce.

There is substantial conflict in the evidence in this case. There is evidence from which the examiner and the Board could have found that Neuman was discharged for valid reasons and not in violation of the Act, rather than as found by the Board that he was discharged in violation of the Act. Our review is limited to an inquiry whether an examination of the entire record supports the conclusion that the Board's findings are supported by substantial evidence.[1]

There was evidence as follows: Early in March 1957, employee Neuman sought out the Business Manager of the International Brotherhood of Electrical Workers, Local Union No. 584, AFL-CIO, and arranged with him to call a Union meeting for the purpose of organizing Respondent's employees. The seven employees who attended the meeting signed Union authorization cards. The next day Neuman persuaded sixteen other employees to sign similar cards, and during the following weeks enlisted several more members. During this organization period, Charles Cart, a company employee, suggested to Production Superintendent Piester that in the event of a layoff, respondent could rid itself of union adherents by including the leaders in any reduction. Piester rejected this proposal on the ground that it would involve Respondent in serious difficulties. He, however, asked Cart whether, as suggested by his layoff proposal, he knew who the union leaders were. Cart replied

[1] *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474.

that he did not. Piester then described an employe whom a neighbor had told him was the union leader. The description fitted Neuman.

On March 19, the Union's Business Manager telephoned M. E. Morrow, Chairman of the Company's Board of Directors, and informed him of the organizational activities. Morrow told him it would do him no good to organize for he would never get a union in that plant. On the morning of March 20, just before the work shift began, Neuman engaged employee Petra Navarro in a short conversation about the Union. When Neuman left, Supervisor Lowe approached Navarro and asked her whether Neuman had discussed the Union and, in particular, whether he had tried to get her into the Union.

On the following morning, Neuman was discharged under these circumstances. It was Neuman's job as a fireman to make oscillograph harness, the assembly of which takes from two to three days. Upon the completion of a harness, it is the shop practice for the wireman to take the harness to the harness tester at a nearby bench and wait there for some time[2] while the harness is being tested, a process which usually takes only five or ten minutes. No supervisor had ever complained about this practice of waiting while the testing went on. On the morning in question, Neuman completed a harness, took it to harness tester Wood and watched the testing for about ten or fifteen minutes. While Neuman was waiting for the completion of the test, President G. R. Morrow entered the room and paused to talk to Foreman Lowe. During this conversation, Lowe pointed across the room toward Neuman and told Morrow, "There

[2] There is some evidence that some electricians would watch the testing for only part of the time required to complete the test. There is also evidence that Neuman was observed at the testing bench for 10 or 15 minutes.

is the boy that caused the whole deal." A few minutes later President Morrow went to the office of Superintendent Piester and demanded that Neuman be discharged. As Neuman started back to his bench, Foreman David approached him and announced, "You are slowing up production and that is a good enough reason to let you go." Neuman asked if that meant that he was being fired, and received an affirmative reply.

Later that same day, the Union's Business Agent Shaull telephoned M. E. Morrow, Chairman of the Company's Board, to protest Neuman's discharge. Admittedly, they had a heated conversation and apparently much profanity was used. According to Shaull's testimony, Morrow said that he would "fire any .... he wanted to * * * that no ..... union was ever going to organize that plant * * * they had tried it before and didn't have any success" and that "he would come out and clean out the whole union * * *."

Respondent testified that Neuman was discharged for loafing. That statement, however, must be weighed in the light of all other relevant testimony and deductions drawn therefrom. It is of some significance that no regular employee had ever been discharged for loafing or talking too much. David, Neuman's foreman, testified that he had never discharged anyone for loafing or talking too much, and that he knew of no one who had ever been discharged for that reason. There is justification for the conclusion that Neuman's dereliction in this respect became of grave concern only after it was known that he was the leader in the Union organization movement. The antipathy and antagonism of Company officials toward the Union and its aversion toward a union shop are well established by the record

The evidence with respect to the violation of Section 8 (a) (1) of the Act is rather meager. There is, however, no conflict in this part of the record. It stands admitted that Superintendent Piester questioned employee Cart as to the identity of the union leaders and that Foreman Lowe questioned Navarro as to whether Neuman had tried to persuade her to join the Union. Such conduct could well intend to influence the employees and interfere with the free exercise of their organizational rights under the Act.

The order of the Board will be ENFORCED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5944

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

MIDWESTERN INSTRUMENTS, INC., Respondent.

Before:

HUXMAN, MURRAH and BREITENSTEIN,
United States Circuit Judges.

DECREE

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Midwestern Instruments, Inc., its officers, agents, successors and assigns on February 25, 1958. The Court heard argument of respective counsel on January 5, 1959, and has considered the briefs and transcript of record filed in this cause. On March 6, 1959, the Court, being fully advised in the premises, handed down its decision enforcing the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding be, and the same is hereby enforced; and that said Midwestern Instruments,

Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

WALTER A. HUXMAN,
Judge, United States Court of Appeals for the Tenth Circuit

Dated: April 22, 1959.

A true copy,

TESTE:

Robert B. Cartwright,
Clerk.

APPENDIX D

29 U.S.C. 160(c)

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. *If, upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, that in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of Section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. *No order of the Board shall require the reinstatement of*

any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

29 U.S.C. 158(c)

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

JAMES R. BROWNING

No. 955

In the Supreme Court of the United States

OCTOBER TERM, 1958

MIDWESTERN INSTRUMENTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

JEROME D. FENTON,
General Counsel,
THOMAS J. McDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
CHRISTOPHER J. HOEY,
Attorney,
National Labor Relations Board, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 955

MIDWESTERN INSTRUMENTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 21a–25a) is reported at 264 F. 2d 829. The National Labor Relations Board's findings of fact, conclusions of law, and order (Pet. 1a–20a) are reported at 119 NLRB 1690.

JURISDICTION

The judgment of the court below was entered on March 6, 1959, and petition for rehearing was denied on April 9, 1959. The petition for a writ of certiorari was filed on May 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the court below was correct in its determination that there was substantial evidence on the record as a whole to support the Board's finding that petitioner violated Sections 8(a) (1) and (3) of the National Labor Relations Act by discharging one employee for his union adherence and interrogating others concerning their union activities.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth *infra*, pp. 8–9.

STATEMENT

A. The Board's findings and conclusions

The Board found that the petitioner violated Section 8(a) (1) and (3) of the Act by interrogating employees regarding the union leadership and activities of fellow employees and by discharging B. C. Neuman because of his union leadership. The facts upon which this finding is based are set forth below.

Early in March, 1957, B. C. Neuman, an employee of the petitioner, sought out the business manager of International Brotherhood of Electrical Workers, Local Union No. 584, AFL–CIO, and arranged with him to call a union meeting for March 8 (R. 10; 43–44).[1] This meeting was attended by Neuman and seven of his co-workers, all of whom signed union authorization cards that night (R. 10; 44). On the

[1] References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

following day, Neuman persuaded 16 other employees to sign cards and during the following week enlisted several more members (R. 10–11; 45). A second union meeting was held on March 18 (R. 11; 45–46).

During this organizational period, Charles Cart, a leadman—but not a supervisor—suggested to Production Superintendent Piester that in the event of a layoff the petitioner could rid itself of union adherents by including the leaders in any reduction in force. Piester rejected this proposal on the ground that it would involve the petitioner in serious difficulties (R. 12; 69–70). He asked Cart, however, whether, as suggested by his layoff proposal, he knew who the union leaders were and Cart replied that he did not. Piester then described an employee whom a neighbor had told him was the union leader. The description, according to Cart, fitted Neuman (R. 12; 70).

On March 19, the union's business manager telephoned M. E. Morrow, chairman of the petitioner's board of directors, and informed the latter of the union's organizational campaign. Morrow told him it would do him "no good to organize" for he "would never get a union in that plant" (R. 12; 116).

On the morning of March 20, just before the work shift began, Neuman engaged employee Petra Navarro in a short conversation about the Union (R. 12; 33). When Neuman left, Supervisor Lowe approached Miss Navarro and asked her whether Neuman had discussed the Union and, in particular, whether he had "tried to get [her] into the union" (R. 12; 34).

On the following morning Neuman was discharged under the following circumstances. It was Neuman's job as a wireman to make oscillograph harnesses, the assembly of which takes from two to three days (R. 13; 46, 48, 71, 85). Upon the completion of a harness, it is shop practice for the wiremen to take the harness to a harness tester at a nearby bench and wait there while the harness is being tested, a process which usually takes only 5 or 10 minutes (R. 13–14; 54–55, 84–86, 119–122). No supervisor had ever complained about this practice of the wiremen (R. 14; 85).[2] If any defect is found, the harness is returned to the wireman who assembled it for correction (R. 14; 47). On the morning in question, Neuman completed a harness and took it to harness tester Wood. Neuman watched the testing and talked to Wood for a period of 10 to 15 minutes while the latter was making the tests (R. 14; 48, 83–84).

While Neuman was waiting for the completion of the tests, the petitioner's president, G. R. Morrow, entered the large room which housed the assembly shop and coil winding department and paused to talk to Foreman Lowe (R. 14; 34, 48, 73, 83). During this conversation, Lowe pointed across the room toward Neuman and told President Morrow, "There is the boy that caused the whole deal" (R. 16; 34, 37). A few minutes later President Morrow went

[2] Although, as harness tester Wood testified, it was not necessary that the wiremen assist him while he was checking a harness, they occasionally "would pick up a screw driver and help [him] hook it up" (R. 81, 86). And Wiremen Barber, Wood and Neuman testified that they sometimes assisted Wood in the checking (R. 120, 122, 47).

to the office of Superintendent Piester and ordered that Neuman be discharged (R. 13, 14–15; 88, 103, 109). In the meantime Neuman, having ascertained that the harness which he had just completed was in working order, started back to his bench to begin another job (R. 13; 48). At that moment Foreman David approached him and announced, "you are slowing up production and that is a good enough reason to let you go" (R. 13; 48). Neuman asked if that meant he was being fired and the foreman answered in the affirmative. Neuman thereupon left the plant (R. 13; 48).

Later the same day, the Union's business agent, Shaull, telephoned M. E. Morrow, chairman of the petitioner's board of directors, to protest Neuman's discharge. During a heated exchange between Shaull and Morrow, the latter declared that he would "fire any —— — — ——— he wanted to * * * that no ——— union was ever going to organize that plant. * * * [t]hey had tried it before and didn't have any success" and that "he would come out and clean out the whole union * * *" (R. 13, 116–117).

On the basis of the foregoing facts and the entire record, the Board concluded that the petitioner discharged Neuman because of his union activities, in violation of Section 8(a) (3) and (1) of the Act, rather than for loafing as claimed by the petitioner (R. 18). It further found that the petitioner violated Section 8(a)(1) of the Act by the conduct of Superintendent Piester in questioning employee Cart regarding the identity of the union leader in the plant, and by the conduct of Foreman Lowe in questioning

Miss Navarro as to whether Neuman had sought to persuade her to join the Union (R. 18).

B. The Board's order

The Board's order requires petitioner to cease and desist from engaging in the several unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act; to offer Neuman immediate and full reinstatement to his former or substantially equivalent position, with back pay; and to post appropriate notices of compliance (R. 28–29).

C. The decision of the court below

The court below affirmed the Board's findings as adequately supported by the record and enforced its order (Pet. 21a–25a).

ARGUMENT

It is plain on the face of the petition (pp. 3–7, 9) that the petitioner's basic quarrel with the court below is that it refused to weigh the evidence and resolve *de novo* the conflict in testimony concerning Neuman's discharge. No such duty rests upon a court reviewing Board orders and the judgment below that the Board's findings with respect to Neuman's discharge are supported by substantial evidence on the record as a whole presents no question warranting review by this Court. The further ruling of the court (Pet. 25a) that petitioner's interrogation of employees concerning union matters "could well intend to influence the employees and interfere with the free exercise of their

organizational rights" likewise presents a factual issue which this Court does not normally undertake to review. The different results in the cases cited by the petitioner (Pet. 11) as in conflict with this ruling are attributable, not to difference in principle, but rather to the circumstances and the particular facts of those cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * * (e) The Board shall have power to petition any United States court of appeals

(including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the United States District Court for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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